(b) if (a) is in the affirmative, what effect would the trial court's decision have on the present claim;
(c) in the event that the trial court holds that the agreements are valid would the plaintiffs have to prove all the damages they claim. If so, how much? These triable issues can only be properly ventilated in a proper trial by calling evidence and proper submissions made on the law.

In so holding that there are triable issues I am not unmindful of s 92 of the Evidence Act 1950 wherein it will be for the defendants to argue at the trial whether it will be open for them to contradict or vary the written terms. This in itself is a question of law to be decided by the trial court and to my mind it is not for this court to shut the door in their face. Depending on the evidence to be adduced on the combined effect of B1 and AYSL7 it is not open to this court to say they, ex facie, are frivolous and if capable of proof they would certainly bring it under proviso (a) at least of s 92 of the Evidence Act. That being the case, following *Chang Ngam Sen* v *Yeoh Bah Chee*,[9] as there are questions of law and fact to be determined I dismissed the plaintiffs' application with costs.

As agreed by all parties the decision in this Suit No K924/85 will be binding on the plaintiffs in the other two Suit Nos K932/85 and K934/85 in which the issues are similar in nature.

Order accordingly.

Solicitors: *William Liaw Chan Lind & Co*; *Pandikar Juhar & Sugumar*.

Reported by *PS Ranjan*

Supreme Leasing Sdn Bhd v Lee Gee & Ors

HIGH COURT (KUALA LUMPUR) – SUIT NO C5983 OF 1985
VC GEORGE J
12 OCTOBER 1987

Hire Purchase – Serial number and engine number of tractor not indicated in hire-purchase agreement – Whether there exists certainty of subject matter – Tractor could not be located for repossession to be effected – Whether claim on basis that tractor is lost contravenes s 75 of Contracts Act 1950 – Whether there must be actual demand for return of tractor before claim in detinue and conversion can be tenable – Terms of agreement to be looked at – Contracts Act 1950, ss 30 & 75

The first and second defendants entered into a hire-purchase agreement with the plaintiff in respect of a tractor. In the agreement, the tractor was described as a Caterpillar 966C, year of manufacture 1980. The chassis number and the engine number of the tractor were not set down in the agreement. The defendants fell into arrears and the plaintiff gave notice that they would terminate the agreement. The plaintiff had also sent a notice of intention to repossess to the defendants. However, the plaintiff was unable to repossess the tractor as the whereabouts of the tractor were unknown. Subsequently, the plaintiff succeeded in obtaining an O 14 judgment against the defendants. The defendants appealed against that judgment, contending that: (a) there was no certainty of subject matter in the agreement as the serial number and engine number of the tractor were not set down in the agreement. Illustration (a) to s 30 of the Contracts Act 1950 was relied on for this contention; (b) there should be a demand for the goods for a claim in detinue and conversion to be tenable; (c) the plaintiffs, in not repossessing the goods, had not mitigated the damages and thus s 75 of the Contracts Act was contravened.

Held, dismissing the appeal:

(1) In the instant case, the subject matter of the agreement is a tractor of a particular make of a particular cubic capacity manufactured in a particular year and which was duly delivered. Illustration (a) to s 30 of the Contracts Act 1950 has no application on those facts.

(2) The rule that there must be a demand for the return of the goods for a claim in detinue and conversion to be tenable has to be qualified by adding the words 'unless the parties have otherwise agreed'. In the instant case, cl 14 of the hire-purchase agreement provides that the hirer shall return the goods to the owner in the event of the hiring being determined by the hirer or the owner under cll 11-12. On the facts, it is clear that the owner had determined the hiring and therefore the mandatory requirements of cl 14 were obtained. Failure by the first and second defendants to return the goods amounts to detinue and conversion without the prerequisite that there be a demand for the goods.

(3) Section 75 of the Contracts Act 1950 deals with penalty clauses in a contract. Clauses 4 and 8 provide for the hirer to be responsible for the goods and to indemnify the owner for the loss or destruction of the goods. Accordingly, the computation of the claim on the basis that the machine is lost (as the goods could not be repossessed) does not contravene s 75 of the Contracts Act.

Legislation referred to
Contracts Act 1950 ss 30, illustration (a) to s 30, 75

Sharon Yap (Ms) for the defendants/appellants.
Chai Woon Fook for the plaintiff/respondent.

Cur Adv Vult

VC George J: On 19 February 1983, the first and second defendants entered into a written hire-purchase agreement with the plaintiff in respect of 'one (1) unit Caterpillar 966C' which I take to be a tractor. Tractors are not included in the Schedule to the Hire-Purchase Act and it was submitted on behalf of the plaintiff without demur that accordingly the agreement is outside the Act. The other defendants are guarantors of the first and second defendants in respect of their obligations under the agreement.

In the agreement the tractor is described as a Caterpillar 966C, year of manufacture 1980. The chassis number and the engine number of the tractor were not set down in the agreement. By the terms of the agreement the tractor was to be kept in the custody and control of the first two defendants and was not to be removed from No 115, Jalan Kilang, Malacca, without the written consent of the plaintiff.

The hiring was for 24 months. The hirers had paid an initial deposit of $55,000 and were to pay 24 monthly rentals of what appears to be $8,663 each after which the parties agreed that the hirers would become the absolute owners of the tractor.

The hirers fell into arrears and as at October 1984 were in arrears of four instalments and were also liable for agreed interest for late payments. At that stage they had already paid 16 of the agreed 24 instalments.

By a letter dated 19 November 1984 sent by AR registered post to the first and second defendants the plaintiff drew attention to the fact that the defendants were four instalments in arrears and demanded payment of those instalments together with 'overdue interest', 'insurance' and 'others'. The plaintiff by that letter gave notice that if the payments were not effected within ten days the plaintiff would terminate the hire-purchase agreement and would sue.

Earlier by letter dated 29 October 1984 the plaintiff had sent a 'notice of intention to repossess' to the first and second defendants.

One Mary Kang, an employee of the plaintiff, in her affidavit stated that the first and second defendants with the connivance of the seventh and eighth defendants had removed the goods and hidden them and that the plaintiff had been unable to repossess the goods. She states that 'the plaintiff tried all its means to repossess but failed because of the concerted conspiracy of the defendants herein'.

On 26 September 1985, the plaintiff caused the writ herein to issue claiming $88,132.55 arrived at by adding to the agreed hire-purchase price of $262,900 interest on overdue rentals less the initial deposit and the instalments that had been paid. Interest on the amount claimed at 0.07% per day thereon from 16 September 1985 until realization is also claimed.

The plaintiffs succeeded in obtaining 0 14 judgment against the first, second, seventh and eighth defendants. They appeal against that judgment.

For the defendants/appellants it was contended that there are a number of triable issues. I propose dealing with them in the order in which Cik Sharon Yap of counsel for the appellants had introduced them in her submission.

One. Her first submission was that there was no certainty of subject matter in that the serial number and the engine number of the tractor were not set down in the agreement. She relied on illustration (a) to s 30 of the Contracts Act 1950. Section 30 is as follows:

> Agreements the meaning of which is not certain or capable of being made certain are void.

Illustration (a) is as follows:

> A agrees to sell to B 'a hundred tons of oil'. There is nothing whatsoever to show what kind of oil was intended. The agreement is void for uncertainty.

In the instant case the subject matter of the agreement is the Caterpillar 966C tractor, the year of manufacture of which was 1980, that had been delivered by way of hiring to the defendants.

In illustration (a), if the oil had been delivered and accepted the question of uncertainty would not arise. In the instant case we have a tractor of a particular make of a particular cubic capacity manufactured in a particular year and which was duly delivered. Illustration (a) has no application on those facts. The argument is misconceived. The uncertainty point has no merits.

Two. The second point taken was that there should be as a prerequisite, a demand for the return of the goods for a claim in detinue and conversion to be tenable.

In my judgment that rule has to be qualified by adding the words 'unless the parties have otherwise agreed'. In the instant case, by cl 11 of the hire-purchase agreement the hirer may determine the agreement. If he does so, he is obliged to return the goods. Clause 12 provides for the owner to determine the agreement and on such determination the owner is entitled to possession of the goods. Then comes cl 14 'in the event of the hiring being determined by the hirer or by the owner under cll 11-12 hereof the hirer shall forthwith return the goods to the owner ...'

On the facts it is clear and for the defendants it was conceded that the owner had determined the hiring. It follows that therefore the mandatory requirements of cl 14 obtained. Failure by the first and second defendants to return the goods amounts to detinue and conversion without the prerequisite that there be a demand for the goods.

Three and four. These two points pose the questions: was it a termination of the hiring by the owner or was there a repudiation of agreement by the hirer which repudiation was accepted?

In my judgment, whether it was one or the other is not important because of the terms of the agreement. The consequences are the same in that cll 14-15 of the hire-purchase agreement come into play in either case.

The hirer has to return the goods and is obliged to pay the agreed 'hire-purchase price' less the aggregate of the sums previously paid, the net proceeds of the sale of the goods and if unsold the value of the goods and a discount for accelerated payment.

Five. The last point taken on behalf of all the defendants is whether the plaintiff had mitigated the damages and if not the effect of s 75 of the Contracts Act 1950.

In view of cll 14-15 the question of the need to mitigate as suggested by counsel for the defendants does not arise.

The argument is that the plaintiff should have repossessed the goods. The plaintiff say that they had tried to repossess but found the goods were hidden away. Neither the first nor the second defendants have come forward to deny this nor have they stated what has happened to the goods. The eighth defendant does deny that he had conspired with the first and second defendants to have the goods hidden away. However, the whereabouts of the goods is not disclosed.

It seems to me that in the face of cl 14, the hirers not having delivered the goods and being silent about the whereabouts of the goods, the stance taken by the defendants that they have a complaint that the plaintiff has not mitigated the damages is cocking a snook at the plaintiff and perhaps even at the court.

Section 75 of the Contracts Act deals with penalty clauses in a contract. The contention made on behalf of the defendants is that in the plaintiff's claim no consideration is given for the value of the machinery. Clause 15 of the contract was referred to. This provides for the taking into account of the net proceeds of the sale of the goods if repossessed and sold or if not sold their value as determined by a dealer. Both limbs of the provision obtain only if the goods are repossessed. In the instant case the goods as has been seen could not be repossessed. Accordingly it seems to me that cll 4 and 8 have to be looked at. These clauses provide for the hirer to be responsible for the goods and to indemnify the owner for the loss or destruction of the goods. Accordingly in my judgment the computation of the claim on the basis that the machine, the subject of the hire-purchase agreement, being lost does not contravene s 75 of the Contracts Act (or any other provision of the Act) as submitted by counsel for the defendants or at all.

Counsel on behalf of the guarantors, the seventh and eighth defendants, as a last point suggested that in any event those two defendants could not be responsible for the value of the goods which were not repossessed in that they are only guarantors. There is no merit in this argument. The seventh and eighth defendants gave a guarantee and indemnity for all loss.

The appeal was dismissed with costs.

Order accordingly.

Solicitors: *Tajul Ariffin & Co; Joseph Tan & Tang.*

Reported by *Ng Sheau Jiuan*

Ban Guan Hin Realty Sdn Bhd v Sunny Yap Chiok Sai & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C224 OF 1985
VC GEORGE J
26 JANUARY 1987

Civil Procedure – Writ issued against government of Malaysia for wrongful forfeiture of car on ground of non-payment of excise duty – Whether action against government time-barred – Allegation of fraudulent usage of money paid to customs authorities – Not act done in pursuance of any written law – Public Authorities Protection Act 1948, s 2(a) – Limitation Act 1953, s 3

The plaintiff purchased a car from the second defendant and issued a cheque for the excise duty payable on the car to the first defendant, a motorcar salesman employed by the second defendant. The vehicle was handed over to the plaintiff together with its registration book. The plaintiff had possession and uninterrupted usage of the vehicle for just over three years when officers of the Customs and Excise Department seized the vehicle alleging that excise duty on it had not been paid. The Sessions Court later ordered forfeiture of the car on the ground that excise duty on the vehicle had not been duly paid. The plaintiff issued a writ against the first and second defendants and against the government of Malaysia as the fourth defendant. The cause of action relied on as against the government was the negligence of its servants in handling the documentation of the vehicle vis-à-vis the payment of excise duty and the issue of the registration card. The plaintiff also alleged that officers in the customs department fraudulently used funds for its own use when the same was for the express purpose of excise duty. The government applied to have the action against it struck out, contending that the acts complained of were acts carried out by servants of the government pursuant to powers/duties under both the Excise Act 1976 and the Road Traffic Ordinance 1958 and that accordingly by s 2(a) of the Public Authorities Protection Act 1948, the action as against the government was time-barred.

Held, dismissing the application:

(1) In respect of the matters covered by the Public Authorities Protection Act 1948, the provisions of the Limitation Act 1953 have no application. There is nothing express or implied in the 1948 Act that would make for the application of any of the provisions of the 1953 Act.

(2) Section 3 of the Limitation Act 1953 expressly excludes the application of the Act in respect of actions for which a period of limitation has been prescribed by any other written law and the Public Authorities Protection Act 1948 is such a